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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-4561

IN THE MATTER OF: BEHRING AND BEHRING, A PARTNERSHIP, et al., BANKRUPT,

JOE C. HUMPHREYS, TRUSTEE,

Petitioner,

v.

NISSHO AMERICAN CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOE C. HUMPHREYS, TRUSTEE,

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NISSHO AMERICAN CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Joe C. Humphreys, Trustee in Bankruptcy of the Estate of Behring and Behring, a partnership, et al, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the entitled case on May 27, 1971.

OPINIONS BELOW

Three relevant orders of the Bankruptcy Court, which are unreported, are printed in their entirety in the Appendix hereto, pages 1-7: (a) "Order Dismissing Trustee's Counterclaim for Want of Summary Jurisdiction", (b) "Order Granting Application for Rehearing of Order Entered February 6, 1969, and Memorandum Thereon", and (c) "Order Sustaining Jurisdiction of the Bankruptcy Court to Hear and Determine Trustee's Counterclaim to Claim No. 277 filed by Nissho American Corporation".

The "Memorandum Opinion and Order" entered by the United States District Court for the Northern District of Texas is reprinted in its entirety at pages 8-19 of the Appendix hereto.

The Opinion of the United States Court of Appeals for the Fifth Circuit to which this Petition is addressed was filed on May 27, 1971, reported at ..... F. 2d ....., is printed separately at pages 20-25 of the Appendix hereto.

JURISDICTION

This is a petition for certiorari to review a decision of the Fifth Circuit Court of Appeals in a bankruptcy matter in which the Trustee filed a counterclaim to a proof of claim filed by Nissho American Corporation. The decision affirmed a decision of the District Court, reversing that of the Referee in Bankruptcy. The Circuit Court below held that the Trustee's counterclaim for an affirmative money award should be dismissed for the reason that it was held to be "permissive", and thus, not within the jurisdiction of the Bank-

ruptcy Court to render an affirmative money judgment thereon. Among the issues presented, all of which are of extreme importance in a most active field of bankruptcy litigation, are whether the rationale of *Katchen v. Landy*, 382 U.S. 323 (1966), should be applied to counterclaims other than those arising solely under § 57(g) of the Bankruptcy Act, 11 U.S.C. § 93(g), and the issue of whether the term "compulsory counterclaim" shall receive a strict or a liberal interpretation in bankruptcy proceedings.

The decision of the Fifth Circuit was filed on May 27, 1971, and a timely petition for rehearing was denied on July 2, 1971. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Was it error for the Court of Appeals to hold that the trustee's counterclaim should not be the subject of summary adjudication by the bankruptcy court, even though the bankruptcy court could clearly set off the trustee's claim against any dividend otherwise due the claimant?

(2) Was it error for the Court of Appeals to hold, in effect, that the key question with regard to whether or not a bankruptcy court has jurisdiction to render an affirmative judgment on a trustee's counterclaim is whether the counterclaim is "compulsory" or "permissive" within the meaning and intent of the Federal Rules of Civil Procedure?

(3) If this Court accepts the "compulsory-permissive" test for determining whether non-§ 57(g) affirmative counter-

claims may be adjudicated by the bankruptcy court, was it error for the Court of Appeals to hold that the trustee's counterclaim, which bears a close logical relationship to the Proof of Claim submitted by the claimant, was not "compulsory"?

STATUTES INVOLVED

This case involves § 2a.(2) and (7), § 23, and § 68 of the Bankruptcy Act, 11 U.S.C. § 11(a)(2) and (7), 47, and 108, respectively, and Rule 13, *Federal Rules of Civil Procedure*. These statutes are reproduced at pages 27-29 of the Appendix hereto.

STATEMENT

On July 14, 1967, Nissho American Corporation filed its Proof of Claim in the instant bankruptcy proceedings, which are pending in the United States Disrtrict Court for the Northern District of Texas, Dallas Division. On August 1, 1968, the Trustee filed his objection to the portions of Nissho claim which sought recovery of "carrying charges" and "interest". He also filed his counterclaim alleging that "carrying charges" and "interest" already recovered by Nissho prior to bankruptcy had been, in fact, usurious interest derived from a disguised financing arrangement which took the form of periodic purchases of cotton by Nissho and subsequent resale of the same cotton to the bankrupt at a higher price.

The Trustee contended, and the Referee in Bankruptcy held, on rehearing, that the counterclaim was subject to summary adjudication by the Bankruptcy Court and was a "compulsory counterclaim" within the meaning of the Rule 13a of the *Federal Rules of Civil Procedure.*

The District Court, on Nissho's Petition to Review, reversed, holding that the counterclaim was not subject to the summary jurisdiction of the Bankruptcy Court and was not compulsory.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Trustee contended that (1) his counterclaim would be subject to the summary jurisdiction of the Bankruptcy Court to render an affirmative money judgment thereon, even if it were only "permissive" within the meaning of the *Federal Rules of Civil Procedure,* and (2) that said counterclaim was in fact "compulsory", having arisen from segments of the same disguised financing arrangement which formed the basis for Nissho's claim in the Bankruptcy Court. The Court of Appeals affirmed the holding of the District Court, relegating the Trustee to a plenary suit against Nissho for recovery of alleged usurious interest charges. The Court of Appeals affirmed the District Court's holding that the Trustee's counterclaim was "permissive" and that the Bankruptcy Court had no jurisdiction to consider the granting of an affirmative judgment based upon a permissive counterclaim. The Court stated that *Katchen v. Landy* applied only to cases in which the Referee found it

necessary to consider a counterclaim in order to "allow", "disallow" or "reconsider" a claim (in effect, only § 57(g) cases).

REASONS FOR WRITING THE WRIT

No area of bankruptcy administration seems so productive of litigation as that relating to the question of summary jurisdiction of the Bankruptcy Court to grant an affirmative money judgment based on a Trustee's counterclaim. This Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966) provided important guidance in the area, but was restricted by its terms to counterclaims arising under § 57(g) of the Bankruptcy Act, 11 U.S.C. § 93(g).

The myriad circuit court decisions and legal articles on the point well illustrate the need of the bench and bar for further guidance on the subject, and present authorities directly in point serve only to increase litigation. See Seligson and King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 73, 79 (1962) and Rochelle and King, *Summary Jurisdiction in Bankruptcy; Kitchen v. Landy and Questions Left Unanswered*, 1966 Duke L. J. 669, and cases there cited and discussed.

1. The rationale of *Katchen v. Landy*, 382 U.S. 323 (1966) furnishes the proper basis for determination of the instant question of summary jurisdiction: the Trustee has asserted a counterclaim which may, under § 68 of the Bankruptcy Act, 11 U.S.C. § 108, clearly be set off against any dividend otherwise due the claimant; the determination of the counterclaim issue in the bankruptcy proceeding for purposes of

set-off under § 68 would, just as certainly as a 57(g) determination as to preference or voidable transfer, which was the subject of the *Katchen* decision, "* * * render unnecessary a trial in a plenary action for an affirmative money judgment because of the res judicata effect to which the determination would be entitled." (*Katchen v. Landy*, 382 U.S. 335, at 402).

The *Katchen* decision was limited to the question of counterclaims forming the basis of claim objections under § 57(g) of the Bankruptcy Act, 11 U.S.C. § 93(g), but its rationale applies as well to the adjudication of counterclaims which are capable of set-off under § 68 of the Act, 11 U.S.C. 108.

The analysis of the *Katchen* decision in *Collier on Bankruptcy* notes, at Vol. 4, p. 951:

> "While § 57(g) is not applicable to the set-off situation of § 68, many of the same reasons as herein expressed are present in both cases. It would certainly appear that the Bankruptcy Court may proceed by way of summary jurisdiction where a compulsory counterclaim is involved and it should not be prohibited from so proceeding even if the counterclaim is merely permissive."

The Court should grant the writ to lay to rest the questions arising from the many circuit court decisions on this point, to specifically extend the rationale of its *Katchen* decision to non-§ 57(g) cases involving questions of set-off under § 68 of the Bankruptcy Act, and to make clear that the "compulsory-permissive" counterclaim dichotomy used by many circuit courts in deciding like questions is not a proper test for determining bankruptcy court jurisdiction.

It is clear that the Trustee's assertion of the usury penalty as a debt due the estate, could at least be used as a defensive matter to the claim of Nissho, whether affirmative relief is granted or not.* See *Collier on Bankruptcy*, Vol. 4, p. 946, where it is stated:

> "* * * So long as such claim is asserted only to reduce or extinguish the plaintiff's claim, there is no question that the Bankruptcy Court has jurisdiction to entertain it." (authorities cited)

It makes no difference that the Trustee's claim is not a compulsory counterclaim. *New York Credit Men's Adj. B. v. Bruno-New York, Inc.*, 102 F. Supp. 495 (S.D. N.Y. 1954). Set-off is favored in bankruptcy, *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U.S. 447 (1914), as a way to balance the claims of parties and to reduce the absurdity of making A pay B where B owes A. *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913).

But it is the question of the jurisdiction of the Bankruptcy Court to award the Trustee an affirmative money judgment which raises the problem. Under the holding of the Court of Appeals, the Trustee would be relegated to a plenary lawsuit in order to obtain an affirmative recovery from Nissho, and the entire bankruptcy proceeding would

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* This is true notwithstanding the holding in *McCollum v. Hamilton National Bank*, 303 U.S. 245 (1938), that a bankruptcy claimant could not set off his debt against a Trustee's usury claim against a claimant.

While *McCollum* holds that Nissho could not set off *the full amount of its claim* against the estate's usury claim, there is certainly nothing in the case's logic to prevent the Trustee from setting off the usury penalty against the dollar amount of any *dividend* due Nissho. Indeed, only that procedure would overcome the absurdity of requiring the Estate to pay Nissho, then seek to recover the dividends plus any excess in a plenary suit.

be made to wait on this eventuality, since ultimate recovery would determine final dividends to be paid.

The rationale of the *Katchen* decision as regards § 57(g) counterclaims was that, since the Trustee's objection would already have been considered by the bankruptcy court, the plenary suit would be subject to disposition on the principle of res judicata. The same point applies here: Nissho would not be deprived of a jury trial, since the referee may consider the Trustee's counterclaim for purposes of set-off. The principle of res judicata would control a subsequent plenary lawsuit. For purposes of determining Bankruptcy Court jurisdiction to render an affirmative money judgment in either in § 57(g) cases or in § 68 set-off cases, the "compulsory-permissive" test is simply a distinction without a difference. The Bankruptcy Court can decide either class of counterclaim for purposes of set-off, and once having done so, there is no practical reason why the entire bankruptcy proceeding must be stayed while the Trustee seeks recovery in a plenary lawsuit where there will be no actual trial. By filing a proof of claim one surely consents to Bankruptcy Court adjudication of any issue constituting a defense to the claim or serving to reduce the dividend finally payable thereunder. There is no practical reason, then, why the Bankruptcy Court should not be able to render an affirmative judgment on its decision of such issue or issues.

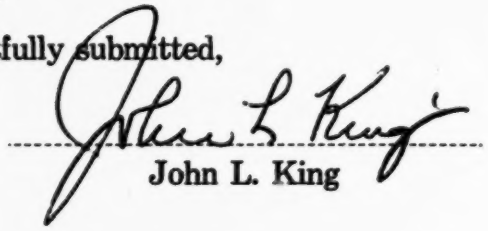
2. Even if this Court accepts the "compulsory-permissive" counterclaim dichotomy as a touchstone for determination of whether a Trustee's affirmative counterclaim not based on § 57(g) causes of action is subject to the summary juris-

diction of the Bankruptcy Court, the Fifth Circuit Court of Appeals' characterization of the instant counterclaim as a "permissive" counterclaim is so restrictive as to be in clear and direct conflict with prior decisions of this Court, with decsions of several other circuit courts, and with the generally accepted liberal construction of the *Federal Rules of Civil Procedure. Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926); *Albright v. Gates*, 362 F. 2d 928 (9th Cir. 1966); *John R. Alley & Co., Inc. v. Federal National Bank of Shawnee*, 124 F. 2d 995 (10th Cir. 1942).

CONCLUSION

For the foregoing reason, this petition for Writ of Certiorari should be granted.

Respectfully submitted,



John L. King

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing Petition upon Messrs. Randolph W. Elliott and Morris I. Jaffe, Wynne, Jaffe & Tinsley, 1000 LTV Tower, Dallas, Texas 75201, attorneys for Respondent, this 16 day of September, 1971.

John L. King

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. BK 3-710

In Bankruptcy

IN THE MATTER OF
BEHRING AND BEHRING,
A PARTNERSHIP, MELVIN A.
BEHRING AND ARTHUR H. BEHRING,
INDIVIDUALLY
BANKRUPT

ORDER DISMISSING TRUSTEE'S COUNTERCLAIM FOR WANT OF SUMMARY JURISDICTION

(Number and Title Omitted. Entered Feb. 6, 1969)

Be it remembered that on the 9th day of January, 1969 came on to be heard Respondents' Motion to Dismiss Trustee's Counterclaim No. 297 of Nissho American Corporation, and the Court having examined the Counterclaim filed by the Trustee, and the Plea to the Jurisdiction and Answer filed by Respondent, Nissho American Corporation; and having heard the arguments of counsel for the Trustees and for Respondent, and having reviewed the authorities, and having concluded that it lacks summary jurisdiction in this proceeding, it is hereby

ORDERED, ADJUDGED AND DECREED that the Trustee's Counterclaim to Claim No. 297 of Nissho American Corporation be dismissed for lack of summary jurisdiction in this Court.

Dated: Feb. 6, 1969.

s/Elmore Whitehurst
Referee in Bankruptcy

Approved as to form
Rochelle, Gandy & King
By s/Wm. J. Rochelle, Jr.
Attorneys for Trustee

Wynne Jaffe & Tinsley
By s/W. Randolph Elliott
Attorneys for Respondent
Nissho American Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. BK 3-710

In Bankruptcy

IN THE MATTER OF
BEHRING AND BEHRING,
A PARTNERSHIP, MELVIN A.
BEHRING AND ARTHUR H. BEHRING,
INDIVIDUALLY

BANKRUPT

ORDER GRANTING APPLICATION FOR REHEARING OF ORDER ENTERED FEBRUARY 6, 1969, AND MEMORANDUM THEREON

(Number and Title Omitted)

The court, upon further research and reflection, is persuaded that substantial doubt exists as to the correctness in law of its order entered herein on February 6, 1969, dismissing the trustee's counterclaim to Claim No. 297 of Nissho American Corporation for lack of summary jurisdiction in the bankruptcy court. It is therefore,

ORDERED that said order entered February 6, 1969, be and it is hereby reconsidered and set aside, and it is further

ORDERED that the motion to dismiss the trustee's counterclaim filed herein on January 8, 1969, be reheard at a date to be fixed which will be mutually convenient to the court and counsel.

Done at Dallas, Texas, this 17th day of February, 1969.

s/Elmore Whitehurst
Referee in Bankruptcy

MEMORANDUM

At the time of the hearing upon the motion to dismiss the trustee's counterclaim against Nissho American Corporation held on January 9, 1969, I was of the opinion that

the trustee's counterclaim would be a permissive counterclaim under Rule 13(b) of the Federal Rules of Civil Procedure and so expressed myself in open court. Upon further research and reflection, I am convinced that I was in error in this respect and that the counterclaim is a compulsory counterclaim under Rule 13(a). *John R. Alley & Co., Inc. v. Federal National Bank of Shawnee, Okla.*, 124 F. 2d 995 (10 Cir. 1942).

Also, I am persuaded after further research and reflection that substantial doubt exists as to the correctness of my decision that the Bankruptcy Court lacks jurisdiction to determine the issues involved in the trustee's counterclaim and to render an affirmative judgment for the trustee if the law and facts should be found to warrant such relief. See Palmer, *The Supreme Court Speaks on Bankruptcy: A Review of Katchen v. Landy, Segal v. Rochelle, and United States v. Speers*, 40 Journal of the National Conference of Referees in Bankruptcy 44 (April, 1966); also Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 Yale Law Journal 1, footnote 186 at page 38; reprinted in 33 Ref. Jnl. 37, 73, at page 77 (July, 1959).

Accordingly, I feel obligated to set aside my order entered February 6, 1969, and rehear the question of jurisdiction after notice to counsel for both parties.

February 17, 1969.

s/Elmore Whitehurst
Referee in Bankruptcy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. BK 3-710

In Bankruptcy

IN THE MATTER OF
BEHRING AND BEHRING,
A PARTNERSHIP, MELVIN A.
BEHRING AND ARTHUR H. BEHRING,
INDIVIDUALLY

BANKRUPT

ORDER SUSTAINING JURISDICTION OF THE BANKRUPTCY COURT TO HEAR AND DETERMINE TRUSTEES COUNTERCLAIM TO CLAIM NO. 297 FILED BY NISSHO AMERICAN CORPORATION

(Number and Title Omitted)

This proceeding was initiated by the filing of a petition under Chapter XI of the Bankruptcy Act in this court on November 19, 1966.

The effort to effect an arrangement under Chapter XI failed. The partnership, and both individuals comprising it, were thereupon by consent adjudicated bankrupts by an order entered December 28, 1966.

At the first meeting in straight bankruptcy, on January 24, 1967, Joe C. Humphreys was elected Trustee and thereafter duly qualified. Attorneys for the Trustee are Rochelle, Gandy and King.

The estate which is large and complicated has been in process of administration since the proceeding was initiated.

On July 14, 1967, the Nissho American Corporation filed its proof of claim (Claim No. 297 on the Claims Register) for $115,232.97, stating the consideration of the debt to be "bales of cotton purchased from the Bankrupt by the Claimant but not delivered."

On August 1, 1968, the Trustee filed a counterclaim to the claim of Nissho American. In paragraph 1 of this pleading the Trustee alleged that the Bankruptcy Court has summary jurisdiction of the Trustee's counterclaim because the "subject matter of said couuterclaim arose out of the same series of transactions as gave rise to the claim, and the claimant, by filing its claim herein, has consented to the exercise of summary jurisdiction of said counterclaim by this court."

In Paragraphs 3 and 4 the Trustee outlined a series of transactions of purchase and repurchase of cotton between the Bankrupt and Nissho American which he alleges to be in reality usurious loan transactions for which he would be entitled to recover twice the amount of usurious interest paid pursuant to Articles 5071 and 5073 of the Texas statutes.

In paragraph 5 he states that he should recover an affirmative money judgment against Nissho American in the sum of $76,420.96 which he says is double the amount of usurious interest collected, and that Nissho American's claim should be disallowed until the penalty is paid in full.

He also asked for the addition of reasonable attorneys' fees.

The Nissho American Corporation was directed by an order to show cause to file a written answer, which it did, prefacing its answer by an objection to the exercise of summary jurisdiction of the Bankruptcy Court with respect to the counterclaim. It denied that the filing of the proof of claim constituted consent to the exercise of such jurisdiction.

Subject to its plea to the jurisdiction, the Claimant denied the essential allegations of the Trustee, and set up other defenses.

On October 25, 1968, the Trustee moved for summary judgment against Nissho American pursuant to Rule 56 of the Federal Rules of Civil Procedure, supporting its motion by an affidavit and reference to testimony taken pursuant to Section 21a of the Bankruptcy Act. Also a memorandum in support of the motion was filed. December 17, 1968,

Nissho American answered the Trustee's motion for summary judgment, and filed counter affidavits, and a memorandum in support of is answer.

January 8, 1969, Nissho American filed a motion to dismiss the Trustee's counterclaim "on the grounds that the court lacks summary jurisdiction because Respondent does not and has not consented to the exercise of summary jurisdiction by the court over said counterclaim but has demanded a plenary trial and hearing on the merits of said counterclaim."

After a hearing on January 9 I concluded that the motion to dismiss should be granted and thereafter on February 6 entered an order dismissing the Trustee's counterclaim for lack of summary jurisdiction in the Bankruptcy Court.

The merits of the counterclaim and the several defenses of the Respondent including applicability of the statute of limitations have not been considered by me.

On February 6, the Trustee filed an application for rehearing and, alternatively, a petition for review, accompanied by a memorandum in support thereof.

After further research and reflection, I was persuaded that substantial doubt existed as to the correctness in law of my order of February 6 dismissing the Trustee's counterclaim to Claim 297 for lack of summary jurisdiction and I therefore entered an order on February 17 setting aside the order of February 6 and directing that the motion to dismiss be reargued.

A further hearing on the motion to dismiss was held February 16, 1969, and additional memoranda have been filed to which I have given careful consideration.

I am now of the opinion that the counterclaim asserted by the Trustee is a compulsory counterclaim under the Federal Rules of Civil Procedure and that the Bankruptcy Court does have jurisdiction to hear and render judgment upon the counterclaim. I adhere to the opinion that the

motion for summary judgment should be dismissed and that a full hearing should be had on the merits of the counterclaim and the several defenses of the Respondent, including the applicability of the statute of limitations. It is accordingly

ORDERED that motion of Nissho American Corporation to dismiss the Trustee's counterclaim to Claim 297 for lack of summary jurisdiction in the Bankruptcy Court be, and it is hereby, overruled.

Dated at Dallas, Texas, this 12th day of September, 1969.

s/Elmore Whitehurst
Referee in Bankruptcy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. BK 3-710

In Bankruptcy

IN THE MATTER OF
BEHRING AND BEHRING,
A PARNERSHIP, MELVIN A.
BEHRING AND ARTHUR H. BEHRING,
INDIVIDUALLY

BANKRUPT

MEMORANDUM OPINION AND ORDER

In this is a review of an Order entered by the Referee in Bankruptcy.

Nissho American Corporation (Nissho American) filed a proof of claim in the bankruptcy proceeding of Behring and Behring, a partnership, formerly engaged in the cotton brokerage business. The trustee for the bankrupt partnership filed a counterclaim against Nissho American for statutory usury penalty and attorney fees. The question presented is whether the Bankruptcy Court has jurisdiction, in a summary proceeding, to adjudicate the factual and legal issues involved in the trustee's counterclaim for statutory usury penalty and attorney fees and render a money judgment against Nissho American under the facts peculiar to this case. The Referee concluded that the trustee's counterclaim under the facts of this case would be a compulsory counterclaim within the meaning of Rule 13a of the Federal

Rules of Civil Procedure,[1] and that this conferred summary jurisdiction on the Bankruptcy Court, in view of the authority of Rule 37 of the General Orders in Bankruptcy[2] under the thrust of *Katchen v. Landy*, 382 U.S. 323 (1966). Nissho American duly perfected its petition for review of the Referee's Order contending that statutory claim for usury and penalty would not constitute a compulsory counterclaim under Rule 13a of the Rules of Civil Procedure under the facts of this case, and further contending that even if the trustee's counterclaim were classified as a compulsory counterclaim under Rule 13a, that this classification, standing alone, does not automatically confer summary jurisdiction on the Bankruptcy Court. This Court agrees with Nissho American on both of its contentions for reasons discussed below.

This proceeding was initiated by the filing of a petition under Chapter 11 of the Bankruptcy Act, and thereafter, by consent the partnership and both individuals comprising it were adjudicated bankrupts on January 24, 1967. On July 14, 1967, Nissho American filed its Proof of Claim in the amount of $115,232.97, showing on its claim form that the consideration of the debt was "bales of cotton purchased from the bankrupt by the claimant but not delivered. Accounting explanation appears on Exhibit "A" attached hereto." Inasmuch as it is necessary to determine whether the transactions on which Nissho American's claim is based are the same transactions on which the trustee's counter-

[1] Rule 13.(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

[2] Rule 37 of the General Orders in Bankruptcy: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

claim is based, Exhibit "A" of Nissho American's claim is reproduced in its entirety as follows:

EXHIBIT "A"

(1) *994 Bales out of 1,000 Bales of Cotton under Warehouse Receipts*

The Nissho American Corporation purchase contract No. HP-639 of Oct. 6, 1966
Behring's Sale No. 868
Behring's Invoice No. B-878 of Oct. 7, 1966

	Quantity	*Whse Rcpt Wt*
Lockhart Compress	500 B/C	266,450 lbs.
San Marcos Compress	494 B/C	262,128 lbs.
	994 B/C	528,578 lbs.

(Remarks) 6 B/C (3,271 lbs.) out of 500 B/C of San Marcos delivered.

Purchase Contract Price	¢15.75 per lb.
Carrying Charge (1 month)	¢ 0.30 per lb.
	¢16.05 per lb.
Amount due Nissho American	$ 84,836

(2) *300 Bales out of 400 Bales under Block Receipts*

C/No.	*Behring's Invoice*		*B/C*	*Weight*	*Price*	*Amount*
HP568	9/9/66	B-402	100	52,578 lbs.	¢18.25	$ 9,595.49
HP568	9/12/66	B-409	100	52,453 lbs.	¢18.15	9,520.22
HP568	9/13/66	B-410	100	51,493 lbs.	¢18.15	9,345.98
			300 B/C	156,524 lbs.		$28,461.69
Interest & Ins. for two months				¢0.30 x weight		469.57
Amount due Nissho American						$ 28,931

(3) Nissho American Claims for Quality/Weight Difference for Cotton, Guaranteed through to Japan by the Bankrupt.

Debit Note	*C/No.*	*Remarks*	*Amount*
9/30/66	332/HP382	Arbitration Result	$ 169.97
9/30/66	360/HP391	Arbitration Result	700.20
9/30/66	484/HP518	Loss in Weight	82.23
11/1/66	484/HP518	Quality Claim	402.20
11/1/66	484/HP518	Loss in Weight	110.34
Amount due Nissho American			$ 1,464.
GRAND TOTAL			$115,232.

The trustee, on August 1, 1968, filed a counterclaim to the claim of Nissho American petitioning the Court for an affirmative money judgment against Nissho American for $76,420.96, together with reasonable attorney fees to be fixed by the Bankruptcy Court. The trustee's counterclaim asserts a cause alleged to have arisen out of a "series of transactions" involving the purchase and repurchase of cotton between the bankrupts and Nissho American, which he alleges to be in reality usurious loan transactions for which the bankrupt is entitled to recover a statutory penalty of twice the amount of usurious interest paid pursuant to the provisions of Article 5071 and 5073 of the Texas Statutes. Nissho American filed a motion to dismiss the trustee's counterclaim "on the grounds that the Court lacks summary jurisdiction because Respondent does not and has not consented to the exercise of summary jurisdiction by the Court over said counterclaim but has demanded a plenary trial and hearing on the merits of said counterclaim."

The trustee contends that the Bankruptcy Court has jurisdiction to render affirmative judgment on the trustee's counterclaim, because "the subject matter of said counterclaim arose out of the same series of transactions as gave rise to the claim and the claimant by filing its claim has consented to the exercise of summary jurisdiction of said counterclaim by the Court." The trustee in support of his counterclaim attached an Exhibit "A" on which exhibit "are summarized transactions which took the form of sales of cotton by the bankrupt to the claimant and repurchase of the same cotton by the bankrupt from the claimant." The transactions summarized by the trustee on his Exhibit "A" and upon which alleged usurious interest was paid by the bankrupt are listed by dates, invoice, number, weight, price, and amount. The listed transactions summarized on the trustee's Exhibit "A" upon which his counterclaim is based do not include any transactions on which Nissho American's claim is based. There was no overall contract or agreement between Nissho American and the bankrupt encompassing the several transactions between them involved in this proceeding which extended over a period in excess of six months.

Since this case presents an issue which is limited to whether or not the Bankruptcy Court has summary jurisdiction of the trustee's counterclaim, a brief discussion of the term "jurisdiction" itself is in order. Jurisdiction, when used in judicial terminology would appear to encompass three distinct elements, that of jurisdiction of the person, jurisdiction to adjudicate the subject matter, and finally power to act with regard to both persons and subject matter. Nissho American by filing its proof of claim in the Bankruptcy Court obviously brought its person within the jurisdiction of that Court. It is the second element, that of the jurisdiction to adjudicate subject matter of the trustee's counterclaim that we are primarily concerned with in this case, and in this opinion unless otherwise indicated, where the term "jurisdiction" is used I will be referring to jurisdiction to adjudicate the subject matter as distinguished from jurisdiction of the person or power to act with regard to persons and subject matter or both.

A review of the authorities supports the proposition that Courts of Bankruptcy are not Courts of general jurisdiction, but are vested only with such substantive jurisdiction as is conferred upon them expressly, or by necessary implication, or by consent, express or implied, of the parties under certain situations. I find no express provisions in the Bankruptcy Act conferring summary jurisdiction on the Bankruptcy Court to adjudicate the merits of a counterclaim asserted by a trustee on behalf of the bankrupt estate against a claimant in that estate, and to render an affirmative money judgment against such claimant. Therefore, if jurisdiction of the subject matter of the trustee's counterclaim in this proceeding lies, it must be found by implication or through the consent, express or implied, of Nissho American. In this case, I find neither such implication nor consent which would confer upon the Bankruptcy Court summary jurisdiction of the subject matter of the trustee's counterclaim.

The paramount authority concerning the doctrine of implied summary jurisdiction of a counterclaim by a trustee

is the opinion of the Supreme Court in *Katchen v. Landy*. That opinion presents a classic example of the three distinct elements of jurisdiction discussed above. In *Katchen v. Landy*, the Court readily concluded that *Katchen*, by filing a claim in the bankruptcy proceeding submitted his person to the jurisdiction of the Bankruptcy Court. Secondly, the Supreme Court concluded that jurisdiction of the claim (not Katchen's person) carried with it by implication jurisdiction to adjudicate the subject matter of objections interposed to the claim by the trustee which, in that case, was an objection to allowance of the claim until a preference was surrendered in accordance with the provisions of Section 57g of the Act.[3] It is extremely significant that the second conclusion, that being jurisdiction of the subject matter, was made on the basis of implied jurisdiction of the Bankruptcy Court as a part of the process of allowance and disallowance of claims, and was not made on the basis of Katchen's consent to such jurisdiction. The third conclusion by the Supreme Court was that once having jurisdiction of both the person and jurisdiction of the subject matter of the objection, the Bankruptcy Court had jurisdiction (power) to enter such order as would afford complete relief between the parties including jurisdiction to order Katchen to surrender the preference.

The reasoning of the Supreme Court in concluding that the Bankruptcy Court had implied summary jurisdiction to adjudicate the subject matter of the defense interposed to the claim is found in that portion of the opinion (headnotes 7 through 10) wherein the Court stated: (citations omitted)

> "It is * * * clear that the expressly granted power to "allow," "disallow" and "reconsider" claims, [Sec.

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[3] § 57. *Proof and Allowance of Claims*

g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

2a. (2) of the Bankruptcy Act][4] which is of "basic importance in the administration of a bankruptcy estate" is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit. This power to allow or to disallow claims includes "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed upon it." The trustee is enjoined to examine all claims and to present his objections, and "when objections are made, [the court] is duty bound to pass on them." "The whole process of proof, allowance and distribution is, shortly speaking, an adjudication of interests claimed in a res," and thus falls within the principle quoted above that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession. Further, the Act itself directs that "objections to claims shall be heard and determined as soon as the convenience of the Court and the best interests of the estates and the claimants will permit," and a committee report indicates that the provision means that "objections shall be heard and determined in a summary way."

"Section 57 of the Act contains another important congressional directive around which much of this case turns. Subsection g forbids the allowance of a claim when the creditor has "received or acquired preferences

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[4] § 2. *Creation of Courts of Bankruptcy and their Jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be here after changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to —

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

> * * * void or voidable under this title." absent a surrender of any preference. Unavoidably and by the very terms of the Act, when a bankruptcy trustee presents a § 57g objection to a claim, the claim can neither be allowed or disallowed until the preference matter is adjudicated. The objection under § 57g is, like other objections, part and parcel of the allowance process and is subject to summary adjudication by a bankruptcy court.

The reasoning employed by the Supreme Court in concluding that the Bankruptcy Court had jurisdiction (power) to order the preference surrendered is set forth in that portion of the Court's opinion (headnotes 15 through 19) which states:

> "So far we have been discussing principles applicable to a case where the trustee presents a § 57g objection to a claim but does not seek the affirmative relief of surrender of the preference. But once it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference. This is so because in passing on a § 57g objection, the bankruptcy court must necessarily determine the amount of preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition imposed by § 57g on allowance of the claim. Thus, once a bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit."

An analysis of that portion of the Supreme Court's opinion first quoted above (headnotes 7 through 10) reveals both the extent and limitations of the doctrine of implied summary jurisdiction in the Bankruptcy Court as it pertains to this case. Such implied summary jurisdiction to adjudicate the subject matter of a counterclaim extends to and includes the subject matter of all objections to the claim, statutory or otherwise, required to be adjudicated as a

part of the process of allowance or disallowance of the claim. This is so without regard to whether the objection arises out of the same transaction as the claim. On the other hand, it is equally clear in the opinion that such implied summary jurisdiction emanating from the express provisions of Section 2a.(2) of the Bankruptcy Act is limited in such cases to adjudicating only the subject matter of those objections which must necessarily be adjudicated as a part of the process of allowance or disallowance of the claim.

The requirements for implied summary jurisdiction of the trustee's counterclaim as set forth in *Katchen v. Landy* requires a determination in this case as to whether or not the merits of the trustee's counterclaim for statutory usury as provided by the statutes of Texas, along with reasonable attorney fees, must necessarily be adjudicated as a "part of the process of allowance or disallowance" of Nissho American's claim. I conclude otherwise. None of the transactions out of which the alleged usurious interest payments arose and which comprise the subject matter the trustee's counterclaim were included in the transactions which comprise the subject matter of Nissho American's claim. They were wholly separate and distinct transactions. I can conceive of no theory, and the trustee has pointed to none in his brief, that would require the Referee to adjudicate the merits of his counterclaim for usury and attorney fees, as a prerequisite to or as a part of the process of allowing or disallowing Nissho American's claim as was required in *Katchen v. Landy*. Accordingly, I conclude that summary jurisdiction in the Bankruptcy Court of the subject matter of the trustee's counterclaim is not to be implied under Sec. 2a.(2) of the Bankruptcy Act under the doctrine of *Katchen v. Landy*.

It is contended by the trustee, although not concluded by the Referee, that Nissho American consented to the adjudication of the trustee's counterclaim by filing its proof of claim in the bankruptcy proceeding. Obviously, from the portion of Nissho American's reply to the trustee's counterclaim, quoted above, Nissho American did not expressly

consent to such summary adjudication. Therefore, if such consent is present here it must be inferred. Consent to summary jurisdiction is not to be lightly inferred, and should be inferred only from a clear manifestation by an adverse party that he is submitting a particular issue to the summary jurisdiction of the Referee for determination. *Gill v. Phillips*, 337 Fed. 2d 258 (5th Cir. 1964). There is nothing in this case from which I can infer that Nissho American manifested its consent to summary jurisdiction of the Referee to adjudicate the particular issues involved in the trustee's counterclaim. By filing its proof of claim, Nissho American manifested its consent to summary jurisdiction of only those issues necessary to be adjudicated in order to pass on the allowability of its claim, or, in the words of the Supreme Court, those issues necessary to be adjudicated as a part of the process of allowing or disallowing its claim. Adjudication of the issues raised by the trustee's counterclaim for usury and attorney fees pertaining to transactions other than the transactions forming the basis of Nissho American's claim is not a part of that process. I, therefore conclude that Nissho American did not expressly or impliedly consent to summary jurisdiction of the Bankruptcy Court to adjudicate the particular issues raised by the trustee's counterclaim.

Finally, I have concluded that the alleged usurious payments on which the trustee has counterclaimed arose out of wholly distinct and separate transactions than those upon which the claim of Nissho American is based and are not within the purview of Rule 13a of the Rules of Civil Procedure which pertains to compulsory counterclaims. This case is to be distinguished from *John R. Alley & Company, Inc. v. Federal National Bank of Shawnee, Oklahoma*, 124 Fed. 2d 995 (10th Cir. 1942). In the cited case it was admitted that the counterclaim for usury arose out of the same transactions (notes) on which the claim of the Plaintiff was based. Also, the notes themselves arose out of a construction contract encompassing all of the debt evidenced by the notes. Since it was without dispute that the counterclaim for usury arose out of the same transactions as the Plaintiff's claim, the counterclaim in the Alley case was

obviously a compulsory counterclaim. In the case at hand the converse is true. The counterclaim here asserted is permissive only. As previously stated, the trustee's counterclaim is founded upon transactions separate and distinct from those upon which the claim of Nissho American is based, and did not arise out of the same transaction or occurrence so as to constitute a compulsory counterclaim as provided by Rule 13a of the Rules of Civil Procedure.

Although the same reasoning underlies compulsory counterclaims under Rule 13a in actions at law unqualifiedly governed by the Rules of Civil Procedure and summary jurisdiction in the Bankruptcy Court to adjudicate objections to claims arising out of the same transaction as the claim, I am of the opinion that the authoritative source of summary jurisdiction to adjudicate such objections is implied under Section 2a.(2) of the Bankruptcy Act, and is therefore not derived through the authority of Rule 13a of the Federal Rules of Civil Procedure. c.f., *Peters v. Lyons*, 275 Fed. 2d 919 (9th Cir. 1960). Also Section 30 of the Bankruptcy Act[5] would seem to limit the effect of the General Orders in Bankruptcy to rules, forms and orders as to procedure over which the Bankruptcy Court already had acquired jurisdiction under other provisions of the Bankruptcy Act, and not as constituting a primary source of jurisdiction within themselves. If the Bankruptcy Court were forced to rely on the provisions of Rule 13a under the theory of its adoption by Rule 37 of the General Orders in Bankruptcy as its only source of authority for summary jurisdiction to adjudicate objections to claims in bankruptcy or counterclaims arising out of the same transaction, it would appear that an argument just as logical could be made that Rule 38a of the Rule of Civil Procedure would also be adopted by Rule 37 of the General Orders, which would require the Bankruptcy Court to decline such jurisdiction in order to preserve inviolate the rights of the litigants to a

[5] § 30. *Rules, Forms, and Orders.* All necessary rules, forms, and orders as to procedure and for carrying the provisions of this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

jury trial. By relying on the theory of implied jurisdiction emanating from the express jurisdiction contained in Section 2a.(2) of the Bankruptcy Act to allow and disallow claims as did the Supreme Court in *Katchen v. Landy*, this restrictive dilemma is avoided and an orderly and expeditious process of allowance and disallowance of claims preserved for summary jurisdiction by the Bankruptcy Court.

Being of the opinion that the Bankruptcy Court is without express, implied or consensual jurisdiction to adjudicate the subject matter of the Trustee's counterclaim in this proceeding and that the Referee erred in this regard, it is ORDERED that the Trustee's counterclaim be and it is hereby dismissed, without prejudice however to the right of the Trustee to reassert the subject matter of his counterclaim should he elect to proceed in a plenary suit.

SIGNED and ENTERED this 21 day of August, 1970.

s/ W. M. TAYLOR

United States District Judge

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30594

In the Matter of: BEHRING AND BEHRING
A partnership, ET AL., Bankrupts,

NISSHO AMERICAN CORPORATION,
Petitioner-Appellee,

versus

JOE C. HUMPHREYS, Trustee
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(May 27, 1971)

Before COLEMAN, SIMPSON, and RONEY, Circuit Judges.

SIMPSON, Circuit Judge: The controlling question in this appeal is the extent of the summary jurisdiction of a Bankruptcy court. There is little dispute in the facts, and the issues presented to us are entirely questions of law. Behring and Behring, a partnership formerly engaged in the cotton brokerage business (Bankrupt) is the bankrupt. Nissho-Iwai American Corporation (Nissho) filed a proof of claim in the amount of $115,232.97, alleging the consideration for the debt to be cotton purchased by the claimant from the Bankrupt but not delivered.[1] The Trustee objected

[1] The transaction upon which Nissho filed a proof of claim bears a Nissho purchase order date of October 6, 1966, and a Behring and Behring invoice date of October 7, 1966.

to the allowance of $2,733.92 of the claim, asserting that this amount was usurious interest which Nissho sought to collect under an understanding between Nissho and the Bankrupt under which the parties would engage in a sham "sale" of cotton to Nissho at the time the cotton was to leave the Bankrupt's warehouse and a "repurchase" of the same cotton by the Bankrupt at the time the cotton reached shipside several days later. The Trustee contended that in truth and fact these were loan transactions and that the consideration paid for the loans was usurious interest in excess of 10%, in violation of Article 5071, Texas Revised Civil Statutes.[2] The Trustee also sought by counterclaim to recover twice the amount of alleged usurious interest paid by the Bankrupt under this arrangement, or $76,420.90. Article 5073, Texas Revised Civil Statutes.[3] The transactions which form the basis for the counterclaim cover a period of approximately six months and are evidenced by over one hundred sale contracts and one hundred repurchase contracts.[4]

On August 12, 1968, Nissho filed a plea to the jurisdiction of the court and subject to a ruling on the plea to the jurisdiction, filed an answer to the counterclaim denying that it had participated in any scheme to extract usurious interest. Then on January 8, 1969, Nissho moved to dismiss the Trustee's counterclaim on the grounds that the Bankruptcy court lacked summary jurisdiction of the counterclaim. The Referee in Bankruptcy granted the motion to dismiss on

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[2] Articles 5069 to 5073, Texas Revised Civil Statutes, were repealed by Acts of the 1967 Texas Legislature. In our view this has no bearing on the transactions which are at issue in this litigation which occurred while the statute was in full force and effect. We proceed in this opinion on that assumption.

[3] See footnote 2, supra.

[4] The last transaction which forms the basis for the Trustee's counterclaim took place almost a month before the transaction which is the foundation for Nissho's proof of claim, and more than two months before Behring and Behring filed a Chapter XI petition for bankruptcy. The petition was filed on November 19, 1966, and the adjudication of bankruptcy occurred December 28, 1966. The transactions of which the Trustee complains took place in a period from March 10, 1966, to September 16, 1966.

January 9, 1969, but on February 17, 1969, vacated and set aside the January 9, 1969 order. On September 12, 1969, the Referee held that the Bankruptcy court did have jurisdiction over the matters contained in the counterclaim. Nissho timely petitioned the district court for review of the Referee's order of September 12, 1969, and the court below on August 21, 1970 reversed the Referee in Bankruptcy and granted the motion to dismiss the Trustee's counterclaim as not within the summary jurisdiction of the Bankruptcy court. The Trustee appeals from this ruling.

Basically, the Trustee argues that the dealings between the Bankrupt and Nissho constituted a continuing financing arrangement, and that the subject of the counterclaim involves segments of the same arrangement which formed the basis for Nissho's proof of claim. The Trustee on this basis contends that his is a compulsory counterclaim under F.R.Civ.P., Rule 13(a) which is therefore plainly subject to the summary jurisdiction of the Bankruptcy court. Nissho disputes these contentions, asserting that the transactions which form the basis of the counterclaim are shown to be entirely separate from those on which the proof of claim is based, and that it is not necessary for the Referee to consider the counterclaim in order to decide whether to allow or disallow the claim of Nissho. This view, adopted by the district court, relegates the Trustee to a plenary suit against Nissho for recovery of the alleged usurious interest charges.

The Referee decided that the Trustee's counterclaim was a compulsory counterclaim pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, as incorporated by Rule 37 of the General Orders in Bankruptcy,[5] citing *John R. Alley & Company, Inc. v. Federal National Bank of Shawnee, Okla-*

[5] Rule 37 of the General Orders in Bankruptcy:

"In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Acts or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

homa, 10 Cir. 1942, 124 F. 2d 995, as indicating the scope of the compulsory counterclaim coverage.

The district court, relying primarily on Section 2a(2) of the Bankruptcy Act, Title 11, U.S.C., § 11(a) (2),[6] in reversing the Referee, held that the subject matter of the counterclaim was not so inextricably interwoven with the subject matter of the claim of Nissho as to be brought under the summary jurisdiction of the Bankruptcy court. We agree with the well reasoned memorandum opinion of the district court, and affirm.

We recognize that in *Katchen v. Landry*, 1966, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391, the Court noted the broad scope of the summary jurisdiction of the Bankruptcy court which stems from Section 2a(2) of the Bankruptcy Act. The Court stated:

> "It is equally clear that the expressly granted power to 'allow', 'disallow', and 'reconsider' claims, Bankruptcy Act § 2a(2), 11 U.S.C. § 11(a) (2) (1964 ed.), which is of 'basic importance in the administration of a bankruptcy estate', *Gardner v. New Jersey*, 329 U.S. 565, 573, is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit". 382 U.S. at 329.

Thus where it is necessary to consider a counterclaim in order to "allow", "disallow", or "reconsider" a claim, it follows that the counterclaim is subject to the summary jurisdiction of the Bankruptcy court. Judge Gewin has clearly

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[6] § 2. *Creation of Courts of Bankruptcy and their jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to —

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.
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articulated the reluctance of this Court to find summary jurisdiction in the Bankruptcy court where not required to meet the mandate of the Supreme Court and the plain language of Section 2a(a):

> "As this Court has emphasized before, the admittedly desirable end of expeditious administration of bankrupt estates should not be allowed effectively to eliminate the protection afforded litigants by the traditional safeguards of a plenary suit, with its right to trial by jury and cross-examination of witnesses. See, e.g., Fox Jewelry Co. v. Lee, 264 F. 2d 720 (5 Cir. 1959); Cf. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)."

Gill v. Phillips, 5 Cir. 1964, 337 F. 2d 258, 262-3.

This brief background sufficiently indicates our primary reasons for concluding that none of the alleged transactions which are the subject of the Trustee's counterclaim must be considered as part of the process of allowing or disallowing the claim by Nissho. The claim of Nissho involves a transaction which took place almost a month after the series of transactions which are the subject of the Trustee's counterclaim. While these sale and repurchase transactions appear to present a somewhat regular and recurring pattern, we think it obvious that each transaction was a separate and severable agreement, and not contingent on any other transaction, past or future, between the parties It is in no sense necessary to determine whether usurious interest was charged on the transactions which transpired between March 10, 1966, and September 10, 1966 — the counterclaim transactions — in order to determine whether the disputed portion of Nissho's claim constitutes usurious interest. The completed transactions which took place prior to the bankruptcy are separate and distinct from the pending transaction which remained uncompleted at the time of the bankruptcy. There is therefore no Section 2a(2) statutory authority upon which to predicate jurisdiction in the Bankruptcy court.

Neither do we find that Nissho consented in any manner to summary jurisdiction by the Referee over the subject of the counterclaim. Nissho certainly never expressly consented to summary jurisdiction over the counterclaim by filing its proof of claim. And we cannot infer that Nissho impliedly consented to adjudication by the Bankruptcy court of anything more than was necessary to determine the validity of its claim. *Gill v. Phillips*, supra.

Furthermore, we agree with the district court that *John R. Alley & Company v. Federal National Bank of Shawnee, Oklahoma*, supra, represents no impediment to our decision. That case was not a bankruptcy case, and the considerations expressed by us in *Gill* against the finding of summary jurisdiction were not present. Even more important perhaps is the difference in the facts of the two cases. Reading of *Alley* reveals that the counterclaim there present alleged usurious interest was exacted on loans in the *same transactions* involved in the main suit by the holder to recover on several notes.

The Trustee further earnestly urges that even if the counterclaim is permissive, the Bankruptcy court has jurisdiction to include the counterclaim. *Alexander v. Hillman* (1935), 296 U.S. 222, 56 S. Ct. 204, 80 L. Ed. 192. That case dealt with the jurisdiction of an equity court to adjudicate counterclaims alleging fraud by individuals who sought to participate in the distribution of assets of a corporation in the hands of a receiver. We can find no basis for applying its teachings to the present question of the jurisdiction of a bankruptcy court to adjudicate counterclaims. We think that a quote from *In re Majestic Radio & Television*, 7 Cir. 1955, 227 F. 2d 152, 156-157, cited by the appellees, states the correct rule:

> "The trustees' argument that Rule 13(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., providing for 'permissive' counterclaims gives the Bankruptcy Court jurisdiction of their counterclaim is without merit. The Federal Rules of Civil Procedure apply to

> cases in bankruptcy only in so far as they are not inconsistent with the Bankruptcy Act. General Order in Bankruptcy No. 37, 11 U.S.C.A. following §53. And, of course, the Federal Rules cannot enlarge the jurisdiction of any court. United States v. Sherwood, 312 U.S. 584, 589-590, 61 S. Ct. 767, 85 L. Ed. 1058." 227 F. 2d at 157.

We conclude that the district court was correct in its determination that the Bankruptcy court had no statutory or consentual authority to entertain summary jurisdiction over the counterclaim asserted by the Trustee in Bankruptcy. The judgment of the lower court is

AFFIRMED.

BANKRUPTCY ACT

§ 2a(2),(7), 11 U.S.C. § 11a(2),(7)

§ 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to —

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

BANKRUPTCY ACT § 23, 11 U.S.C. § 46

§ 23. Jurisdiction of United States and State Courts. a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and

trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

BANKRUPTCY ACT § 68, 11 U.S.C. § 108

§ 68. Set-Offs and Counterclaims. a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate and allowable under subdivision g of section 57 of this Act; or (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.

Rule 13, Federal Rules of Civil Procedure

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was

commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-456

IN THE MATTER OF: BEHRING AND BEHRING,
A PARTNERSHIP, et al.,
BANKRUPT,

JOE C. HUMPHREYS, TRUSTEE,
Petitioner,

v.

NISSHO AMERICAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

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IN THE MATTER OF: BEHRING AND BEHRING,
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JOE C. HUMPHREYS, TRUSTEE,
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NISSHO AMERICAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Nissho American Corporation, respectfully submits this Brief in opposition to Petitioner's Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and prays that said Petition be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals for the Fifth Circuit, in affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, held that the Trustee's counterclaim in the present case was not a compulsory one within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure. In so holding, both lower courts found that the subject matter of the counterclaim was not so inextricably interwoven with the subject matter of Respondent's claim as to be brought under the summary jurisdiction of the Bankruptcy Court. This finding was, in turn, based on the further finding that it was not necessary to consider the Trustee's counterclaim in order to "allow", "disallow", or "reconsider" Respondent's claim within the meaning of Section 2a(2) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(2). This *factual* determination by both of the lower courts is fully supported by the evidence which they considered, and presents no question which merits this Court's consideration.

While Petitioner argues that the lower courts' finding that the Trustee's counterclaim is not compulsory is too restrictive and in conflict with prior decisions of this Court and the decisions of several other circuit courts, he cites no cases in point which create the alleged conflict. None of the cases cited are bankruptcy cases, and General Order in Bankruptcy No. 37, 11 U.S.C.A. following § 53, provides:

> In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, *in so far as they are not inconsistent with the Act* or with these general orders, be followed as nearly as may be. . . . [Emphasis added].

The case of *John R. Alley & Co., Inc. v. Federal National Bank of Shawnee County, Oklahoma*, 124 F.2d 995 (10th Cir.

1942), which is cited by Petitioner, although not a bankruptcy case, did involve a counterclaim for usury. This case, which was relied on by the Referee in Bankruptcy in making his determination that the Trustee's counterclaim was compulsory, was easily distinguished by the Court of Appeals for the Fifth Circuit in its opinion (see Page A-25 of Appendix to Petitioner's Petition for a Writ of Certiorari) and by the District Court in its opinion (see Page A-17 of Appendix to Petitioner's Petition for a Writ of Certiorari).

Petitioner has cited no decision of this Court or any of the circuit courts which holds that a permissive counterclaim not involving the determination of a preference under §57(g) of the Bankruptcy Act,11 U.S.C.A. §93(g), is within the summary jurisdiction of the Bankruptcy Court. It is therefore apparent that the decisions of the lower courts in this case do not conflict with any decision of the other circuit courts or of this Court and that the case meets none of the criteria of Rule 19, Rules of the Supreme Court of the United States, 28 U.S.C.A. for the granting of a writ of certiorari.

The thrust of Petitioner's argument is (1) that the Trustee's counterclaim is subject to set-off, under the provisions of §68 of the Bankruptcy Act, 11 U.S.C.A. §108, against any dividend which may be payable to Respondent on its claim filed in the Bankruptcy Court; (2) that the Bankruptcy Court can therefore determine the merits of the counterclaim for defensive purposes; (3) that once having determined the merits of the counterclaim for defensive purposes, that determination would be *res judicata* in any plenary action, so (4) the Trustee should be granted an affirmative judgment on the counterclaim.

The defects in Petitioner's argument are numerous. Of controlling importance is the fact that the Trustee's counterclaim is *not* subject to set-off against Respondent's claim or any

dividend which may be payable to Respondent upon its claim in the Bankruptcy Court. This Court's holding in *McCollum v. Hamilton National Bank of Chattanooga*, 303 U.S. 245 (1938) at 248-49, dictates this result:

> Section 68a declares: 'In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' The words 'debts' and 'credits' as there used are correlative. What is a debt on one side is a credit on the other. [citation omitted] Liability for the penalty [for collection of usurious interest] does not arise in contract but is laid in invitum as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt.
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> It follows that respondent is not entitled to satisfy petitioner's judgment [for the penalty for the collection of usurious interest] by deducting the amount of it from respondent's claim against the bankrupt's estate.

It is therefore clear under this decision that any recovery by the Trustee of the penalty for collection of usurious interest would not be subject to set-off against the claim of Respondent, or any dividends which it might receive based on that claim. This is simply not one of the appropriate cases for the application of the doctrine of set-off under § 68. As this Court further explained in *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U.S. 447 (1915) at 454-55:

> The object of this provision [§ 68] is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the doctrine of set-off between mutual

> debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. [citations omitted]
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> * * *
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> Mutual debts do not, indeed, properly constitute cross claims by the civil law, for they extinguish each other *ipso jure*, and the party alone in whose favor the balance is has a claim which can be enforced by action, and his claim is only to the extent of such balance.

Petitioner quotes from *Collier on Bankruptcy*, Vol. 4 at pages 951 and 946 to support his argument that permissive counterclaims should be subject to the summary jurisdiction of the Bankruptcy Court, if only for defensive purposes. If the statements which Petitioner quotes are examined in the context of the surrounding analysis, it is apparent that the author is referring to claims which by their nature would be properly subject to set-off under §68. Since the Trustee's counterclaim in the present case is not such a claim, the analysis relied upon is not appropriate. Additionally, and more directly on the point, the author observes in *Collier on Bankruptcy*, Vol. 4 at pages 946-47:

> But where the trustee attempts to obtain, by virtue of a set-off or counterclaim, a judgment for a balance against the plaintiff, or other affirmative relief, the problem becomes twofold: (1) does the bankruptcy court have power to grant an affirmative judgment in summary proceedings; (2) has the plaintiff, by filing his petition or otherwise, consented to the exercise of such jurisdiction? It appears agreed that a bankruptcy court does not have the jurisdiction to render such a general judgment in favor of the bankrupt estate

> without consent; but as to the character of the plaintiff's consent there is some lack of unanimity.
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> [T]he mere filing of a proof claim for allowance is not such a clear expression of consent.

Since the Trustee's counterclaim in the present case is not one which is subject to set-off against Respondent's claim and does not involve a preference, voidable lien, or fraudulent transfer of property, it does not meet the criteria established in the decision of the Court of Appeals for the Tenth Circuit in *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964) or the other cases reviewed in footnote 1 to this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966), 326-27, for the determination of the claim pursuant to the summary jurisdiction of the Bankruptcy Court.

If this Court were to accept Petitioner's reasoning for subjecting the determination of the Trustee's counterclaim to the summary jurisdiction of the Bankruptcy Court, there would be no limit to the type of matters which would thus be subject to summary disposition in the Bankruptcy Court. Any claim which the bankrupt may have against a creditor on a matter wholly unrelated to the proof of claim filed by the creditor may in some sense be considered a defense to the creditor's claim. If the Trustee were ultimately to prevail on that claim, the resulting judgment might provide a defense or off-set to all or part of the creditor's claim in the sense that it would constitute a credit against the claim. The possibility of this result, however, does not justify subjecting the creditor to a summary

adjudication of any claim which the Trustee may have against him, with the attendant loss of the traditional safeguards of a plenary suit, including the right to trial by jury and the other protections afforded by the Federal Rules of Civil Procedure. This Court has held that a creditor may be deprived of these safeguards and have a counterclaim against it determined within the summary jurisdiction of the Bankruptcy Court where the same is necessary as part of the allowance or disallowance of its claim against the bankrupt. *Katchen v. Landy*, 382 U.S. 323, 329. The lower courts in the present suit have followed this Court's clear directions contained in *Katchen v. Landy* and have held that the Trustee's counterclaim is not compulsory within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure and that it is not necessary to consider the merits of said counterclaim to allow or disallow Respondent's claim in the Bankruptcy Court. There being no express consent by Respondent to the Bankruptcy Court's exercise of summary jurisdiction over the Trustee's counterclaim, the Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas, Dallas Division, have correctly held that there is no basis for holding that the Bankruptcy Court has authority to entertain summary jurisdiction over the Trustee's counterclaim in this case.

CONCLUSION

The decisions of the lower courts in this case are consistent with the decisions of this Court and of other courts in the Federal system on this question and present no matter which requires a determination by this Court. Accordingly, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ORIGINAL SIGNED BY
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CERTIFICATE

This is to certify that a copy of Brief of Respondent in Opposition was this, the 23rd day of October, 1971, served upon Rochelle and King by mailing the same to them at 1200 Republic National Bank Building, Dallas, Texas, 75201.

ORIGINAL SIGNED BY
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